

Central Law Journal.

ST. LOUIS, MO., JANUARY 22, 1915.

FAITH AND CREDIT CLAUSE AS REGARDS STATUTES AND THEIR CONSTRUCTION.

In *Western Life Indemnity Co. v. Rupp*, 35 Sup. Ct. 37, the Supreme Court appears to lay down the rule that to secure the enforcement of a foreign statute, it may not be sufficient to plead and prove it as a fact, but also there should be pleaded and proved, as a fact, construction placed upon it by the enacting state.

In this case the Court of Appeals of Kentucky thought that the legislature of Illinois never intended an Illinois statute to have "an extraterritorial effect," and for this reason it was not regarded in a case in Kentucky court. This disregard was claimed to be in violation of the faith and credit clause of the constitution, a mere inspection of the statute being appealed to as demonstrating that such was not its meaning.

Mr. Justice Pitney said: "It does not appear that the court's attention was called to any decision by the courts of Illinois placing a different construction, or, indeed, any construction upon the section in question. If such decision existed, it was incumbent upon defendant to plead and prove it as matter of fact. We are referred to no authoritative judicial construction of the statute in the state of its origin, nor have we searched for any, for what is matter of fact in the state court is matter of fact in this court upon review."

There are two or three things about this statement which would seem to call for special notice: (1) Naturally a court of the state of origin of a statute would not be called upon to rule that it had no extraterritorial operation. The question could not arise where its own courts were enforcing it as to a right claimed as arising in the state. If it were made the ground

of a judgment by a court in another state as operating extraterritorially, the judgment of that court ought to be protected under the faith and credit clause of the Constitution, whether as an original proposition its reasoning were opposed or not. Certainly, too, the foreign court's judgment would be respected, if extraterritorial effect were denied the statute, as the instant case shows.

(2) The pleader of a foreign statute is bound to plead both affirmatively and negatively, namely affirmatively that there is a foreign statute and negatively that no construction by a court of the state of origin has been placed on it. Or if it has been construed, he must aver and prove that no subsequent adjudication has displaced the construction that he exhibits as matter of fact to the court.

This reasoning cannot be met, we think, by any claim that a statute is so plain and unambiguous that it speaks for itself. The rule, if one of law, could admit of no such exception, because it is after all merely a matter of private opinion that any statute is of this nature. It might, however, make search for adjudication, in order to establish the negative of which we speak, something like looking for a needle in a haystack.

But, is it not evident that proof of such a negative often would be attended with the greatest of difficulty? And is it in fair compliance with the faith and credit clause of the constitution that the statute of a state should not be given the meaning it bears upon its face, unless an objector shows it has been construed a particular way?

The idea of negative proof of non-construction by the court of origin of a statute ought also to embrace the idea of no subsequent amendment or repeal thereof. In this way the value of the faith and credit clause could be frittered away by distinctions, multiplying difficulties in applying a rule of evidence, that was intended to be simple and clear.

Proof of a foreign law may be in several ways, one is by an authenticated copy of the law, and another is by testimony of reliable witnesses as to what it is. But all of it is in the past tense and practically it might be impossible really to bring it down to governing force as of a time in relation to a matter before a court. But in none of the cases we have read has the principle of what has been shown to exist continues to exist, until the contrary has been made to appear, not been recognized. And we think no principle is more wholesome than this one with respect to foreign law. A statute, therefore, exhibited as the law of a state should carry a presumption to a foreign court that it is the law thereof, according to the foreign court's construction thereof, unless an objector may show as matter of fact that it has been amended or repealed or construed otherwise. An authenticated statute offered in evidence ought, at least, to be deemed *prima facie* evidence that it is the law of another state or of a foreign country.

NOTES OF IMPORTANT DECISIONS

BANKRUPTCY — SOLVENCY OF MEMBERS OF A PARTNERSHIP.—The question has been much debated in lower federal courts with the result of conflict of opinion, whether a partnership is a legal entity, which may be declared to be bankrupt, irrespective of the fact of the solvency or insolvency of the members thereof. But this conflict has been deemed to be settled in favor of the proposition that a partnership is not to be deemed bankrupt if its members or any of them are solvent, by *Francis v. McNeal*, 228 U. S. 695.

In *Abbott v. Anderson*, 106 N. E. 782, the Supreme Court of Illinois holds that where there was a composition by an alleged bankrupt partnership accepted by the creditors, upon theory by the court, that thereby the partners were released from the partnership indebtedness, nothing being said in the acceptance of the composition about membership liability, this released the members, though this theory was upon a mistaken view of the law. This holding was made in a case where objecting creditors to the composition, after-

wards brought suit against a solvent partner of such partnership.

The opinion of the Illinois court shows the grounds of objection by these creditors in the bankruptcy proceeding on two points, (1) that the bankrupt court had no jurisdiction over assets of the individual partners, and (2) that the partners had not been adjudicated bankrupts. The district court and its referee took the view that the assets of the partnership could be regarded separately, and overruled the objection.

This, it is true, was a decision the court had authority to make, and its decision unappealed from would be the law of the case. But what did such a decision embrace? It only embraced the question of jurisdiction, and only, argumentatively, involved the question of release of the partners.

How would this be with the non-objecting creditors? Surely, it would be the case of the conferring of jurisdiction over subject-matter by consent, a something we have always understood not to be permissible. Why should an objecting creditor, merely objecting on jurisdictional grounds, be placed in worse plight than one who accepts benefits from a court without jurisdiction over the subject-matter? Should the former be penalized for his effort in trying to keep the court from committing error?

In this case it seems to us that the judgment of the district court should be deemed to involve nothing more than that it could proceed as it was proceeding.

PLEADING AND PRACTICE—DAMAGES UNDER FEDERAL OR STATE LAW IN MASTER AND SERVANT CASES.—The case of *Ingle v. Southern Ry. Co.*, 83 S. E. 744, decided by North Carolina Supreme Court, is more important in what it assumes to be the law than in anything it really decides.

This was a suit by a servant's administrator against a railroad for death from injury suffered in the course of employment and assignment of error was predicated upon instructions upon the measure of damages as based on state law, rather than on federal law, the federal law being the federal employers' liability act.

Heretofore we have referred to decisions where petition was amended according to exigency of a case, as or not it showed an injury under state or federal law, and the Federal Supreme Court ruled that this could be done. *Wabash R. Co. v. Hayes*, 34 Sup. Ct. 729, 79 Cent. L. J. 37.

And more recently we have made the suggestion that state law should be made to

conform to federal law as to parties who should sue for death by servant in the course of duty. 80 Cent. L. J. 26.

The North Carolina court enforces strongly the importance of this suggestion, and goes further than the decision by the Supreme Court above instanced. It rules, in effect, that the legal representative of the servant of a railroad need not show by his petition whether he sues under state or federal law, but the case will be tried under the law which fits the facts.

The court considers the assignment and then discusses the proof to ascertain which law was applicable to the case, and, holding that it was insufficient to show that the injury from which death resulted occurred in interstate commerce the instructions of the court on the measure of damages was correct.

We desire to repeat our suggestion in 80 Cent. L. J. 26 as to entire correspondence between federal and state law, so that whether the injury be in interstate commerce or under state law there will be no necessity whatever of courts in pleading or variety in instructions if there is question of fact as to which law the action comes under. We could well imagine there might have been submitted to the jury this question of fact before the court, though it was, in effect, held there need be no counts, such as spoken of in *Wabash R. Co. v. Hayes*, *supra*. Uniformity of law on this subject is, to our mind, fully as important as in any of the bills proposed by the Commissioners on Uniform State Laws.

NEGOTIABLE INSTRUMENTS LAW—REPEAL BY IMPLICATION OF PRIOR CONFLICTING LEGISLATION.—In 79 Cent. L. J. 331, we treated editorially, the question of repeal by implication, of prior statute in conflict with Negotiable Instruments Law. The case there considered a decision by West Virginia Court of Appeals, in which a gambling statute made void a negotiable instrument in the hands of an innocent holder for value, where the debt it represented was for gambling. It was held there was no repeal.

The Supreme Court of Iowa makes the same holding as to a usury statute which provides that the note is void even in the hands of such a holder. *Perry Savings Bank v. Fitzgerald*, 149 N. W. 497.

The Iowa court describes the negotiable instruments law as "a comprehensive piece of legislation. It goes into detail in dealing with the subjects embraced by it. The scope of it deals with commercial paper, so as to protect purchasers of such against defenses available as between the original parties." Nev-

ertheless, upon the principle of repeal by implication not being favored, it holds that the usury statute as regards such a holder has not been repealed.

We greatly regret, for the reasons stated in our editorial above alluded to, the disposition of one other court to treat an act intended to be construed uniformly in all the states, as if it were ordinary legislation. Uniformity being the keynote of legislative intention, all rules of construction should be made to bend thereto.

A SUCCINCT ANALYSIS OF THE CLAYTON ANTI-TRUST ACT.

Since the period known as that of the Reconstruction, our national commercial activity has developed by leaps and bounds. Railroads have been built, municipal communities established, deserts have been made to blossom like the rose and national wealth has increased until to-day the United States stands in the forefront, both commercially and otherwise, as one of the world powers. With this increase of wealth and improved transportation facilities came the corporate form of capital investment and control, a convenient and necessary method of conducting large enterprises which has so rapidly grown in favor and familiarity that to-day the amount of corporate capitalization is no longer a matter of more than casual comment. Gradually, however, there has developed along with this tremendous commercial prosperity and increased wealth an impression, more or less well founded, that this enormous development of corporate organization and the facility for combination which such organizations afforded, were likely to be used, and were in fact, in certain instances, being used to oppress individuals and injure the body politic. Thus came into being the "trust" question and the ever-increasing problem of how best to regulate and control this accumulated wealth and its power in such a manner as would best subserve the ultimate good and improve industrial conditions. In the halls of Congress, these

sentiments finally crystallized in the Sherman Anti-Trust Act of July 2, 1890, which was the first concrete legislation upon the subject.

Doubtless no single piece of legislation, either state or federal, has ever been more prolific of litigation than the Sherman Act. Lawyers, as a whole, should arise and call it blessed, for "it has filled the hungry with good things, and the rich it has sent empty away." The first federal statute of its kind, it has occupied the attention of the courts, both trial and appellate, in large measure almost from its very enactment. Two hundred and seventy written decisions are a mute but efficient testimony to the multitudinous legal questions embodied within its eight sections and involving its constitutionality and interpretation; and the end is not yet in sight, since the "rule of reason" announced by the United States Supreme Court in the recent Standard Oil case has opened wider the door for further inquiry and controversy as to what constitutes a "good trust or a bad one," and what is a "reasonable restraint of trade."

The Sherman Act made no attempt to define "commerce"; it related to interstate and foreign commerce only, and, in substance, declared every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade, illegal, and provided a penalty for violations of said Act in the way of a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both, in the discretion of the court. Not only so, but the courts, by a long line of decisions, beginning with *United States v. Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep 432, decided June 4, 1891, and ending with the decision of the United States Supreme Court in the *Standard Oil Company* case, decided May 15, 1911 (221 U. S. 63) uniformly held the act to apply to all contracts in restraint of trade, whether such restraint could be regarded as reasonable at common law or not. In the *Standard Oil* case, however, the United States Supreme

Court modified its prior rulings, by declaring that "The statute * * * evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not *unduly* restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an *undue restraint*." (*Standard Oil Co. v. U. S.*, 221 U. S., 60). Thus, again, after more than twenty years' refusal so to hold, has the door been opened wide by the court of last resort, for legal inquiry as to what constitutes a "reasonable restraint of trade" and thus has arisen, Phoenix-like from the ashes of like contentions long denied, the "rule of reason" concerning which, both favorably and otherwise, so much has recently been said.

This brings us to a consideration of the present Clayton Act. It consists of twenty-six sections, was approved October 15, 1914, and is not to be confused with the Federal Trade Commission Act, an entirely separate and distinct piece of Congressional legislation. The Clayton Act applies only to interstate commerce, and primarily deals with (1) unjust trade discriminations; (2) sales or leases conditioned upon exclusive handling by vendee or lessee of vendor's or lessor's goods, wares and merchandise; (3) the exemption of labor and labor unions from federal regulation and control; (4) corporate acquisition of capital stock of other corporations; (5) interlocking corporate directorates; (6) regulation of bids between corporations for materials and supplies; and (7) the issuance of injunctions and restraining orders in the observance and enforcement of the above matters:

As used in the Act, commerce is for the first time formally defined as trade or commerce among the states, territories, District of Columbia, foreign nations or insular possessions or other places under the jurisdiction of the United States, except the Philippine Islands.

(1) A merchant engaged in interstate commerce must not discriminate among his customers, either directly or indirectly, in the price of his wares, when the effect of such discrimination will be to substantially lessen competition or tend to create a monopoly. As is now the law affecting common carriers, the interstate merchant must from this time forward, treat all customers alike and in all cases, except as hereinafter stated. If he does so discriminate, either by rebate, reduction in price, or otherwise, he may be sued by any injured party not so favored, either in the district where such offending merchant resides, or is found, or has an agent, and the plaintiff may recover treble damages, court costs, and a reasonable attorney's fees. It is permissible, however, to make concessions in price on account of grade, quality, quantity, difference in cost of selling or transportation, or in order to meet bona fide competition in the same or different communities. What this section of the act denounces is the arbitrary and excessive price discrimination whereby large corporations have exterminated their smaller competitors. For instance, it is now illegal for a manufacturer or business concern to abnormally reduce the price of their goods in a given territory solely for the purpose of driving out a competitor for trade in that region. A person, however, is not obliged to accept all orders, but he may, in good faith, select his own customers. But a provision in a bill of sale or lease of goods, wares, merchandise or machinery to the effect that the lessee or vendee shall not use or deal in the goods of a competitor, is illegal and void, and the party inserting such provision in such contract, will be subject to the same penalties as those last hereinabove mentioned. This prohibition applies to a patented as well as unpatented articles.

(3) Labor, agricultural or horticultural organizations, instituted for purposes of mutual help and having no capital stock, are expressly exempted from the operation

of all anti-trust laws, and "shall not be held or construed to be illegal combinations or conspiracies in restraint of trade." Such organizations may no longer be enjoined by legal process from strikes or boycotts, and neither of said acts, in the absence of overt acts of violence, constitute violations of any laws of the United States. This is a distinct departure from the prior law, and precludes relief from federal courts, by way of injunctions, in matters of strikes, lockouts and other labor troubles.

(4) If the purchase by one business corporation of the whole or any part of the capital stock of another results, or is likely to result, in a substantial lessening of competition between them, or in a restraint of trade in that locality, or tends to create a monopoly, such purchase is forbidden, and if consummated, is illegal. And if the same results are likely to ensue, either through voting proxies or otherwise, neither may one corporation acquire the whole or any part of the capital stock of two or more corporations. This latter provision is aimed at voting trust agreements, and as at present advised, it would seem to render all such future agreements inoperative and void.

One business corporation engaged in interstate commerce may, however, for investment purposes only, acquire the whole or any part of the capital stock of another, and such purchase is not forbidden by the Clayton Act. Capital stock so acquired, however, cannot be voted by the purchaser or used in any manner whereby prior competition between said corporations may be substantially lessened or destroyed. Again, larger corporations frequently find it advisable to conduct certain phases or branches of their business through the medium of subsidiary corporations, the latter of which are to be owned and controlled by the former, and the organization of such corporations for the purposes above indicated, as well as the holding and voting

by the parent corporation of their capital stock, are permissible.

A railroad or other common carrier may aid in the construction of branch or short lines when the latter are so located as to become feeders to its main line, and to that end may acquire any or all of the capital stock of such branch or feeder lines it may, also, in cases where there is no prior substantial competition between them, purchase and hold the whole or any part of the capital stock of such branch line already constructed by an independent company; and finally, said railroad or common carrier may extend any of its own lines by purchase of capital stock or otherwise acquiring an interest in any other common carrier, in all cases where no substantial competition existed or exists between them.

(5) Interlocking directorates between theretofore competitive business corporations are prohibited in manner as follows:

From and after October 15, 1916, "no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus and undivided profits aggregating more than \$1,000,000,00 . . . if such corporations shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the anti-trust laws." The eligibility of a director hereunder is to be determined by the total amount of capital, surplus and undivided profits, exclusive of dividends paid to stockholders, at the end of the fiscal year next preceding the election of directors and said eligibility continues only from year to year.

If the deposits, capital stock, surplus and undivided profits of any national bank, banking association or trust company organized or operating under Congressional enactment exceed in the aggregate the sum of \$5,000,000, no officer, di-

rector or employee thereof may, while so connected therewith, serve in like capacity on the board of, or be employed by, any other national bank or financial institution operating under national laws. Neither may any private banker or director of any state bank or trust company, whose deposits, capital, surplus and undivided profits aggregate more than said above amount, be eligible for election to or employment by any bank, banking association or trust company doing business under the laws of the United States.

In all cities having a population of 200,000 or more, and except as to mutual savings banks and in cases where the entire capital stock of one bank is owned by stockholders in the other, no national bank, banking association or trust company operating under federal laws "shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place." Neither of these provisions, however, apply to Class A directors of federal reserve banks, and their application is postponed until two years hence, to-wit, October 15, 1916.

A few concrete illustrations of the foregoing paragraphs may not be amiss: For instance, *A*, a director of one corporation, cannot at the same time be a director of one or more competitors, if the capital stock, surplus and undivided profits of each corporation exceeds \$1,000,000.

B, who is at present either officer, director or employee of a national bank or other financial institution organized or operating under the laws of the United States, and *C*, who is either a private banker or a member of the board of any state bank or trust company, cannot serve as officer, director or employee of any other banking concern *anywhere* which is organized under the laws of the United States, if the deposits, capital, surplus and undivided profits of each institution exceeds \$5,000,000.

D, now either a private banker, or a present director, officer or employe of any bank or trust company located in any city of more than 200,000 inhabitants, is absolutely prohibited from employment either as officer, director or employe by any other bank, banking association or trust company located in the same place.

But *E*, a director in a million dollar dry goods corporation, or serving in like capacity in a banking house, state or federal, the capital stock of which exceeds \$5,000,000, is not precluded from becoming a director of another corporation, located in a city like St. Louis or elsewhere, but engaged in an entirely different and non-competitive business. The exemptions heretofore noted affecting mutual savings banks and Class A directors of Federal Reserve Banks are self-explanatory, and require no specific illustration.

But the inquiry necessarily arises: Suppose the foregoing provisions of the act are violated? What liability ensues—who is punishable, and to what extent? Section 14 of the Clayton Act imposes in general terms upon any director, officer or agent of the offending corporation a fine not exceeding \$5,000 or imprisonment not exceeding one year, or both in the discretion of the court, for a violation of any of the *penal provisions* of the anti-trust laws. The sections affecting the eligibility and powers of corporate directors last above referred to contain no penal provisions and are absolutely silent in reference thereto. It necessarily follows, in the light of this apparent legislative oversight, that none of the acts above denounced, even if committed, constitute penal offenses under the anti-trust laws, and the offender therefore escapes any criminal liability. Undoubtedly the individual so illegally holding office may be ousted therefrom in civil proceedings, but no criminal prosecution therefor will lie.

(6) The provisions of the Act affecting common carriers and prescribing the circumstances under which they must re-

ceive bids for securities, supplies and other articles of commerce, or make or have contracts for construction or maintenance of any kind, are slightly drastic and severe. As between the carrier and any other corporation, firm, partnership or association with whom it is about to have such dealings, if the purchases or contracts to be made are in excess of \$50,000 for any one year, and if the carrier shall have on its board of directors, or as its president, manager, purchasing or selling agent, or agent in the particular transaction, any person who is at the same time also a director, manager, purchasing or selling agent of the other concern, or has any substantial interest therein—such purchases or dealings cannot be had or contracts made, other than by competitive bids submitted under regulations to be prepared by the Interstate Commerce Commission. All bids must disclose the name and address of each individual bidder; or the names and addresses of the officers, directors and general managers, if a corporation, and the names and addresses of all firm members, if a partnership or firm. This information, together with a full and detailed statement of the transaction or purchase, and showing the manner of bidding, must be filed by the carrier with the Interstate Commerce Commission thereafter and within thirty days. If the carrier fails to comply with these requirements, it shall be subject to a fine not exceeding \$25,000; and every director, agent, manager or officer thereof, who shall have knowingly participated in such violation, either by vote or otherwise, and any person who shall directly or indirectly influence or attempt to influence such bidding, may be fined not exceeding \$5,000, or imprisoned in jail not exceeding one year, or both, in the discretion of the court.

For example, a director of a railroad company is, at the same time, a director of a railway supply corporation, from whom said railroad is about to purchase rolling stock or other supplies for the ensuing

year. If the aggregate purchase price exceeds \$50,000, such purchase by the railroad from the supply company cannot be made, except on competitive bids, wherein the railway supply company is the actual lowest bidder. If such purchase be made by said railroad company from said railway supply company without such bids, the railroad company may be fined \$25,000, and every director, officer, manager or agent of the carrier who knowingly acted in the premises, will be subject to a maximum fine of \$5,000, or imprisonment in jail for one year.

(7) In all cases arising under the anti-trust laws, as provided by the Clayton Act, other than proceedings instituted by the United States thereunder, the original complaints are to be lodged with the Interstate Commerce Commission, the Federal Reserve Board or the Federal Trade Commission, according as the defendant may be either respectively a common carrier, a national bank, trust company or banking association operating under national banking laws, or a corporation or individual engaged in general business. The service of the complaint, which is to be in writing, may be either personal, substituted or by mail, and process thereon is made returnable at the end of thirty days. The defendant then appears, either in person or by counsel, and the matter proceeds to final hearing. All findings of fact by the commission are conclusive, and if an adverse ruling is made, the commission before whom the matter is pending, enters its order requiring the defendant, within a time certain, to cease and desist from further violations of the anti-trust laws. If, at the expiration of this period said order has not been complied with, said commission then certifies the entire record, consisting of the pleadings, testimony and finding, to the United States Circuit Court of Appeals for the proper circuit, wherein the action of the commission may be reviewed and the order complained of finally affirmed, modified or set aside.

General equitable relief by way of injunction may also be granted to any person, firm, corporation or association by any federal court having jurisdiction of the parties, against threatened loss or damage from any violation of the anti-trust laws, except as against common carriers in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission.

This, in brief, is the Clayton Act, and a succinct analysis of its essential provisions. Its efficacy and efficiency will largely depend upon the manner in which the several commissions charged with its administration, exercise their jurisdiction. Interstate business, like interstate commerce, is now for the first time in this country, subject to national regulation and control, and many of our railroad friends may now smile at their business colleagues and say, "How do you like it?" It is always to be borne in mind, however, that except as to the specific prohibitions affecting national banks and common carriers, none of the acts or things forbidden by the Clayton Bill, violate this new anti-trust law, unless the effect thereof will be to "substantially lessen competition or tend to create a monopoly in any line of commerce." This all important qualification necessitates a careful investigation of the facts in each case, and to use a homely but trite expression, "every tub must stand on its own bottom." No definite sign-post marks the way, and much is left to doubt and uncertainty. But this can never be avoided. Rarely, if ever, can statutes of this character be expressed in terms sufficiently specific as to render their application in border-line cases free from ambiguity. Yet the "rule of reason," if intelligently and conservatively applied, will ultimately clarify and remove all such complexities, and afford a safe and sane guide for the interpretation and construction of the Act.

BYRON F. RABBITT.

St. Louis, Mo.

NEGLIGENCE—INVITEE.

JEWISON v. DIEUDONNE, et al.

Supreme Court of Minnesota. Oct. 16, 1914.

149 N. W. 20.

(Syllabus by the Court.)

Where there is a holding out of a partnership relation concerning the control of a place where business is transacted, and an invitation extended, under such circumstances of publicity as to warrant the inference that a person subsequently injured therein through the negligence of an employe of those in charge must have had the right to believe that those extending the invitation were in control of the premises, a recovery may be had without regard to the actual existence of the partnership relation; liability in such case, however, depending, not wholly upon the doctrine of estoppel, nor that of respondeat superior, but upon the assumption of a definite status with reference to the property and a specific relation to the person injured, to which the law attaches direct and positive duties.

PHILIP E. BROWN, J. Action against defendants Dieudonne, as partners, and defendant Nyquist, as their alleged employe, to recover damages for personal injuries claimed to have been caused by the latter's negligence while plaintiff was in a shop conducted under the firm name of E. Dieudonne & Son. A verdict was returned against all defendants, and each of them appealed from an order denying their applications for judgment, notwithstanding or for a new trial.

The accident occurred in the village of Janesville, in the afternoon of September 5, 1912. It is undisputed that in 1885 defendant Emil Dieudonne, to whom we will hereafter refer by his Christian name, opened a farm implement business on his own account and under his name, in the village mentioned, and so continued to operate it until 1900, in which year his son, Eugene, became of age and was associated with him therein; the firm thereafter being so conducted for the period of five years, under the name of E. Dieudonne & Son. Defendants claim that in 1905 this partnership was dissolved by Emil's withdrawal, the son continuing the business alone, and that since then the father has had no interest in the same, except as a creditor, and has taken no part in its management. It was conducted at all times in a building owned by Emil, but rented to Eugene after the dissolution, which fronted on the graded and paved main street of the village, the main entrance opening upon the sidewalk. The building was 42 feet wide and 90 feet deep, and situated in the center of the block, on a

lot 140 feet deep, extending back to a 20-foot unpaved, ungraded, littered alley bisecting the block. Up to 1910 it had been used entirely for the sale and exhibition of farm machinery, having an office in front and a board floor, on a level with the sidewalk, running back its entire length. After the alleged dissolution and prior to 1910, the business of repairing automobiles was conducted in the rear part, and in the latter year all the board floor except about 37 feet in front was taken out, the level lowered 2½ feet, and a cement floor substituted. The rise between the two floors was not boarded up, and there were no permanent steps connecting them; a movable step, consisting of boxes, being used for this purpose, and being shoved under the board floor when space was needed. The area of the cement floor was divided into two compartments, one used as a garage and the other as a repair shop, with an entrance through a door opening to the rear. Nothing was kept for sale in these compartments, nor was either fitted up for the reception of customers, and the workmen there employed were engaged solely in repairing automobiles. Adjoining the office articles were kept for exhibition, including repairs for machinery. On the day of the accident, plaintiff, a farmer residing near Janesville, entered the building through the rear door for the purpose of exchanging some mower repairs he had obtained on the previous day. Defendant Nyquist, an employe in the repair shop, was then engaged in the garage in repairing a defective automobile belonging to defendant Eugene, and as plaintiff was about to enter he backed the machine out through the door, noticing plaintiff and another man enter just after he came out. Stopping the automobile outside the entrance, but leaving the motor running very fast and without applying the brakes, on the supposition that the machine was not in gear, but not in fact knowing where the defect was, he proceeded with his work. He then stepped into the car, and as he did so it started to move forward, and, not being under control, ran into the garage. Plaintiff, who at this time was passing through the rear of the building in order to reach the office, was struck by the machine when near the temporary step and injured. He was familiar with the premises and their uses, and he and others had frequently entered the building through the rear for the purpose of transacting business in the front.

[1] 1. Defendants insist that plaintiff was a mere licensee, to whom no duty was owing, except to refrain from willfully injuring him while on the premises, and hence in no event

is entitled to recover against any of them. We have set out the location and details with reference to the construction and use of the building, because these matters were elaborately covered by the testimony given on the trial, and are also relied upon to establish the point mentioned. But it clearly appears that the building was such as is ordinarily used in the villages of the state for exhibition of farm implements and automobile repairs, and taking into consideration the business transacted in it, its location, and the use made by patrons of the rear door, we cannot say that a customer like plaintiff, when entering from the rear, would have no better standing than a bare licensee. The fact that the alley was unimproved and strewn with rubbish, such as is usually found in such places, is not of importance; for farmers, who of necessity are often confronted with such conditions, would naturally be frequent customers of the business conducted in the front of the building, and the persons in charge must have known that the condition of the alley would not, and did not, prevent them from using the rear entrance when more convenient than the front. Plaintiff was entitled to the rights of one who comes upon the premises of another by invitation. We find no reversible error in the instructions in this regard.

[2, 3] 2. The further claim that, as a matter of law, defendant Nyquist's negligence was not established, and that plaintiff should be held to have been negligent, are not sustained. We deem the recital of the facts stated concerning the manner in which the automobile was handled a sufficient refutation of the first, and the question of plaintiff's negligence was so plainly for the jury that the second does not merit discussion.

[4] 3. Defendants also contend that, because the Dieudonnes are sued as partners, unless such relationship was established, no recovery can be sustained against any of defendants. Tort-feasors, however, are jointly and severally liable, and G. S. 1913, § 7897, provides that:

"When two or more are sued as joint defendants, and the plaintiff fails to prove a joint cause of action against all, judgment may be given against those as to whom the cause of action is proved."

See *Miles v. Wann*, 27 Minn. 56, 6 N. W. 417; *Huot v. Wise*, 27 Minn. 68, 6 N. W. 425; *Fryklund v. Great Northern Ry. Co.*, 101 Minn. 37, 111 N. W. 727.

[5] 4. The complaint, in addition to alleging that defendants Dieudonne were copartners, charged that they conducted their business in the building wherein the accident occurred,

and had done so for a long time previous thereto, inviting plaintiff to come there and trade, and that plaintiff had for a long time been a customer, entering their place of business under such invitation for the purpose of trading; and defendants admitted that subsequently to the alleged dissolution of the partnership the business was continued under the same firm name, this being admitted by Emil in order to give his son credit, and that with his knowledge and without protest advertisements over the name "E. Dieudonne & Son" were thereafter published in a newspaper of the village, soliciting patronage. Furthermore, it appeared that plaintiff had, for a number of years both before and after the dissolution, been a customer of the business, and no proof was made that he had notice or knowledge of the dissolution. But the court, nevertheless, held and charged that plaintiff could recover only in case an actual partnership relation existed, and defendants insist that the evidence does not warrant a finding of such, and, further, that, this being an action in tort, the instruction given by the court was correct. We sustain defendants' first claim, and hold the evidence insufficient to establish a partnership. This conclusion necessitates consideration of the second contention as to the correctness of the instruction. It has long been settled that a merchant who keeps his place of business open to customers, and invites and permits them to enter therein to trade, owes them the duty of exercising reasonable care to keep the premises safe for their ingress, progress and egress. *Corrigan v. Elsinger*, 81 Minn. 42, 83 N. W. 492. Under this rule, if the alleged partnership had been established, Emil's liability would be clear. The rule, however, has been further developed, and in the case cited it was held that this duty was nondelegable, and could not be shifted upon a contractor engaged in making repairs, whose negligence caused the accident. In *Mastad v. Swedish Brethren*, 83 Minn. 40, 85 N. W. 913, 53 L. R. A. 803, 85 Am. St. Rep. 446, it was held that a person having the management and control of a public place of amusement, which he invited the public to attend for pay, was bound to exercise reasonable care to protect his patrons from assaults and insults from one becoming intoxicated with liquor which he there sold him. In *Thompson v. Lowell, etc., St. Ry. Co.*, 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323, a street railway company was held liable for an injury to a spectator by reason of the negligent management of a stage exhibition at a pleasure resort owned by it and on its lines, though the exhibition was conducted exclusively by

an independent contractor, hired by the company for that purpose, and though the latter was not interested in the performance or its management, except in so far as patrons were induced, through its advertisements, to use its line in reaching the place of amusement. See, also, *Richmond, etc., R. Co. v. Moore*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258.

Considering the rule as applied in the cases cited, to which many others of like effect might be added, what is its underlying motive? Does liability result because of ownership or actual occupation or management, or does it flow from the invitation extended to the public by one who has clothed himself with every indicia of the right to extend the same, coupled with apparent ownership or control? Defendants rely largely upon *Smith v. Bailey*, 2 Q. B. (1891) 403, and certain textbooks approving it, which criticize and refuses to follow *Stables v. Ely*, 1 C. & P. 614, wherein it appears to have been held that one who allowed his cart to go out with his name on it held himself out to the world as liable for injuries occasioned by the negligence of anyone driving it. We agree with both the *Smith* case and the text authorities cited, which are sound in principle, but think they are not decisive of the present inquiry, if at all in point. In both the *Smith* and the *Stables* cases the accident happened on the highway, without the element of invitation and the duties incident thereto. In cases like the present one the gist of liability lies in the invitation, when extended under the circumstances indicated in the question. It does not rest wholly in estoppel, but upon the assumption of a definite status—of control or ownership—with reference to the property, and a specific relation—involved in the invitation—towards the person injured, neither of which the defendants here attempt to deny. Nor, as we have seen, does it depend upon the doctrine of respondeat superior. See, also, *Pollock on Torts* (8th Ed.) 74, 75. Where, as in this case, there is a holding out of a partnership relation concerning the control of a place where business is transacted and an invitation to patronize extended under such circumstances of publicity as to warrant the inference that a person subsequently injured therein through failure to exercise due care for his safety must have had the right to believe that those extending the invitation were in control of the premises, liability results without regard to the existence of the partnership relation. Any other rule would enable those who have allowed invitations to be extended to the public in their names to escape liability for non-performance of the duties they have thereby

assumed by setting up ownership or control of the place in some irresponsible person.

The finding of the jury as to negligence and damages, when considered in connection with the undisputed facts, establish liability on the part of the defendant *Emil*, irrespective of the actual existence of the alleged copartnership, and there is nothing in the assignments of error showing sufficient prejudice to the rights of defendants to render this conclusion unjust. Hence the order is affirmed.

BUNN, J. I dissent from the proposition that *Emil Dieudonne* is liable in this case. It was necessary, in my opinion, to establish a partnership in fact, and this the evidence failed to do. There was a "holding out;" but my view is that this does not create a liability, under the facts here, either on the doctrine of estoppel or that of invitation. The fact that the firm name remained "*E. Dieudonne & Son*" had nothing to do with the happening of the accident to plaintiff. It does not appear that in going upon the premises, which were not inherently dangerous, plaintiff was relying upon the exercise of care on the part of the elder *Dieudonne*. The doctrine of invitation, upon which the majority opinion predicates liability, has no application in my opinion, where the party sought to be held is not in fact in possession or control of the premises.

NOTE.—Liability of Reputed, But Not Actual, Partner, for Tortsious Acts of Partnership.—The instant case, it is perceived, partly goes upon the theory of estoppel, so the court says, but it is hard to see from what is said that its ruling of liability rests upon any other ground. We do not consider in this note any cases in contract or those in tort where any benefit was received by an alleged member of a partnership, or where there was individual notice to one injured by a tort of non-existence of partnership relation. The court says here there was a holding-out of a partnership relation concerning the control of a place where business is transacted and an invitation extended," etc., and on that liability is predicated. If that is not estoppel pure and simple we fail to understand what may amount to estoppel.

In contract cases there is a presumption—dependent of any statute—that promisee relies on status. In tort cases why should there be any such presumption? One does not incur danger from negligence deliberately, or he will be barred all recovery.

And it is easily perceived that such a case as *Thompson v. Lowell, etc. St. Ry. Co.*, 170 Mass. 577, 40 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323, does not cover what is necessary in a case of this kind. That admits interest of the railroad in the management of the business where the injury occurred, and the independent contractor was acting under its authority. To exactly the same effect is the case of *Richmond, etc. Ry. Co. v. Moore*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258. The railroads in these cases actively, and not passively, held out invitation to the public to visit the grounds upon which injury occurred.

There is the case of *Shepard v. Hynes*, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675, a unanimous opinion by Circuit Court of Appeals, in which the opinion was written by Thayer, C. J., where the identical question in the instant case was involved, and which reached closer to establishing liability than does the instant case, and was decided the other way. This case showed wrongful attachment by a partnership which had been dissolved but no notice of dissolution given. The same name was continued to be used after dissolution as before. The instructions of the trial court called the attention of the jury to the evidence which showed the parties had once been partners; that some people knew the retiring partner was a member of the firm; that it was secretly dissolved; that the business was conducted in the old firm name and that Moore must be regarded as a partner of Shepard, and liable for all of his tortious acts in conducting the firm business.

Judge Thayer said: "We are of opinion that this view was erroneous, because the object of the suit was not to charge Moore with a contractual liability to someone with whom the firm had formerly dealt, but to make him respond for a willful tort said to have been committed by Shepard. In such an action it was necessary for the plaintiffs to show that the relation of partners actually existed between them." * * * The court erred in forcing Moore into the position of a partner, by erecting an estoppel and then holding him accountable for the acts of Shepard, as if the relation of partners actually existed."

In *Lindley on Partnership*, 7th Ed., p. 78, it is laid down broadly that the doctrine of holding out only applies in favor of persons who have dealt with a firm on the faith that the person whom they seek to make liable is a member of it, and "it has no application to action of tort arising from the negligent conduct of a firm where no trust has been put in it."

In *Sherrod v. Langdon*, 21 Iowa 518, it was said that where one participated in the sale of sheep and so held himself out to the purchaser as to make him believe he was a partner, and the purchaser relied on his representations, he would be held as a partner, but that is not such a case as this. *Maxwell v. Gibbs*, 32 Iowa 32, is upon the same theory.

As showing how narrow is the rule of holding-out making one responsible as a partner, *vide Thompson v. First Natl. Bank*, 111 U. S. 529, which says that *Poillon v. Seoor*, 61 N. Y. 456, which held a holding-out partner liable to a customer on account, though such relied in no way on the holding-out, is the only American case sustaining such a doctrine.

In *Bates on Partnership*, § 102, it is said: "Liability arising from holding-out is not confined to actions on contract, but may arise in torts, as for deceit and false warranty in a sale of sheep, in which sale defendant participated or for damages to a horse and buggy let to the supposed firm." It is seen these things all have a certain relation to contract—cases in which the tort might have been waived and suit brought on the contract.

The point often may not arise, but that the majority opinion in the instant case is wrong seems clear, for the simple reason that the invitee could not have relied on such holding-out.

C.

ITEMS OF PROFESSIONAL INTEREST.

LOUIS D. BRANDEIS, THE APOSTLE OF EFFICIENCY IN THE MANAGEMENT OF PUBLIC SERVICE CORPORATIONS.

The charge that the legal profession is controlled by "big business" and is out of touch with the people has been often disproven. But a living example of the error in such a charge against the profession is to be found in the career of such a lawyer as Louis D. Brandeis, of Boston, whose picture appears on our cover page.

Some time in June, 1910, the railroads of the United States, operating east of the Mississippi and north of the Ohio and Potomac rivers, acting in pursuance of a common purpose, filed with the Interstate Commerce Commission new tariffs providing for large advances in freight rates. The commission ordered a public investigation as to the justice and reasonableness of the proposed increased rates, and meanwhile suspended the operation of the new tariffs. The investigation occupied about six months.

In this investigation Mr. Louis D. Brandeis acted as counsel for the Traffic Committee of the trade organizations of the Atlantic seaboard.

The railroads sought to justify the increased rates on the ground that they needed greater net income, and asserted that this need was due to increased operating costs, resulting mainly from higher wages. They contended that increased rates were imperative because the possibilities of economies in the operation of railroads had been practically exhausted.

Mr. Brandeis opposed the proposed advance on several grounds; but that which attracted most attention was his contention that there still existed in railroad operation huge possibilities of economies which could be attained by the introduction of scientific management—economies aggregating on all the American railroads "at least a million dollars a day."

Since this time Mr. Brandeis has appeared frequently before the courts, before state legislatures, before the Interstate Commerce Commission and before committees of Congress, almost always in the attitude of opposition to the demands of big business, and in the interest of associated groups of business men and citizens' committees. The brief of Mr. Brandeis before the Interstate Commerce Commission has been published by the *Engineering Magazine*, of New York, under the title

of, "Scientific Management of Railroads." Other works of Mr. Brandeis are "Business, a Profession," and "Other People's Money."

Mr. Brandeis is not a political agitator, long on talk and short on ideas. He is a constructionist, a philosopher and a practical scientist on matters of business management. His acute intellect has compelled the captains of industry and of big business to acknowledge the justice and truth of his conclusions. He is to-day the greatest obstacle to the success of the railroads' propaganda for higher freight rates. Not because he is a demagogue—railroads are not afraid of them—but because, by his keen reasoning, he has proven that by more scientific management the railroads could save enough every year to enable them to make handsome profits on lower rates than are charged to-day.

There is opening a wide field of usefulness, as well as of profit, for lawyers in appearing for associated committees of citizens before the public service commissions of our large cities and of some of the states. The new Federal Trade Commission still further enlarges the circle of possibilities of this field of legal endeavor. With the entrance of many of the best legal minds of the country into this field of usefulness, the popular delusion concerning the subsidization of the American bar will have wholly passed away.

A. H. ROBBINS.

CORRESPONDENCE.

LAW GIVING SUPREME COURT POWER TO REVIEW DECISIONS OF STATE INSURANCE INVALIDATING STATE LAWS AS CONTRARY TO FEDERAL CONSTITUTION.

Editor Central Law Journal:

Your readers will be interested to know that a bill recommended by the American Bar Association for two successive years has passed both Houses of Congress and was approved by the President on the 23rd of December.

This bill gives to the Supreme Court the right to grant a certiorari to review the decision of the highest court of a state against the validity of the State Statute, or authority claimed to be repugnant to the constitution, treaties, or laws, of the United States.

EVERETT P. WHEELER,

Chairman Committee of American Bar Association to Suggest Remedies to Prevent Delay and Unnecessary Cost in Litigation.

HUMOR OF THE LAW.

Judge—You say you are suing this man because he did not blow his horn before he ran into you.

Plaintiff—I didn't say he didn't blow his horn. I said that I couldn't hear it. His blamed old car rattled too much.

The Income Tax Commissioners recently wrote to a business man pointing out that they were not satisfied with the amount he had set down as his income. "Dear Sirs," was his courteous answer: "You are not half so dissatisfied as I am!"

"William," asked the judge's wife, "did you get the spool of silk thread I ordered you to bring home yesterday?"

"No, my dear, I did not."

"Dear me, how provoking! Be sure to get it to-day."

"I'm sorry, but I cannot do so."

"Why, not, I'd like to know?"

"I have looked through all the books and I have been unable to find a precedent that would warrant me in taking such action."

A witness in a trial in Ohio not long ago had been kept on the stand for some time. Naturally he was getting a little weary of the proceedings.

"If," said the cross-examiner, noticing the witness' irritability, "you would only answer my questions properly, there would be no difficulty. If I could only get you to understand that all I want to know is what you know, we—"

"It would take you a lifetime to acquire that," snapped the witness.

The lawyer scowled. "What I mean is that I merely want to learn what you know about this matter. I don't care anything about your abstract knowledge of law or your information in regard to other matters, but what you know about this case."

"Oh, that isn't what you want," said the witness. "I've tried to give you that for some time, and—"

Whereupon the lawyer interposed objection, and witness was obliged to cease.

"If I don't want to know what you know about this particular case and nothing else," inquired the lawyer later, "what do you think I want to know?"

This seemed so easy that the witness began to grin. He said:

"It isn't what I know that you want to know; it's what you think I know that you're after, and you're trying to make me know it or prove me a liar."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of
ALL the State and Territorial Courts of Last
Resort, and of all the Federal Courts.

Arkansas	1, 4, 17, 27, 28, 78, 89, 105, 113
Connecticut	54, 65
Delaware	30, 86, 91
Georgia	10, 12, 26, 35, 47, 48, 53, 55, 60, 72, 82, 97, 99, 101, 107, 110, 114.
Kentucky	3, 13, 14, 20, 31, 32, 33, 34, 40, 41, 43, 46, 50, 61, 63, 66, 77, 80, 83, 84, 88, 92, 95, 96, 119, 121.
Maine	5, 9, 7, 25, 44, 51, 58, 59, 67, 70, 73, 79, 103, 118.
Maryland	45
Minnesota	11, 38, 102
Nebraska	71
New Jersey	29, 37, 81, 94
North Carolina	2, 9, 22, 36, 69, 100, 108, 109
Pennsylvania	16, 75, 98, 104, 120
South Carolina	15, 19, 42, 116
Texas	18, 21, 39, 52, 56, 64, 85, 87, 117
Vermont	24, 49, 68, 106, 111, 115
West Virginia	8, 62, 74, 90, 93, 112, 122
Wisconsin	57, 76

1. **Account Stated**—Defined.—It is the consent of the debtor that imparts the character of an account stated to an account; and the parties may agree as to the items on one side and leave the items on the other open for settlement.—*Godfrey v. Hughes & Hall, Ark.*, 169 S. W. 958.

2. **Adverse Possession**—Color of Title.—Where the deed, under which defendant claimed, included the land in controversy by specific description, though an additional description referred to the property as the Jones land, a tract which did not include the land in controversy, it constitutes color of title for defendant's possession of the property in dispute.—*John L. Roper Lumber Co. v. McGowan, N. C.*, 83 S. E. 8.

3.—Evidence.—Mere acts of trespass, such as cutting timber, taking coal and planting two or three crops during a period of 20 years, are insufficient to establish adverse possession.—*Smith v. Chapman, Ky.*, 169 S. W. 834.

4. **Animals**—Bailment.—One who furnishes the service of a male animal for breeding purposes is held to ordinary care to prevent injury.—*Cotton v. Ingram, Ark.*, 169 S. W. 967.

5.—Domestic.—A cat is a domestic animal within Pub. Laws 1909, c. 222, § 17, authorizing the killing of dogs found worrying, wounding, or killing any domestic animal.—*Thurston v. Carter, Me.*, 92 Atl. 295.

6. **Arrest**—Suspicion.—Arrest without a warrant, because the officer suspected that accused had intoxicating liquor in his suit case, was unjustifiable.—*Caffini v. Hermann, Me.*, 91 Atl. 1009.

7. **Assault and Battery**—Justification.—That plaintiff, to mislead an officer, deliberately created circumstances arousing his suspicion, and that the officer was thereby misled and became suspicious, and under such circumstances assaulted or arrested plaintiff, to ascertain if intoxicating liquors were being carried in his suit case, held not to defeat a recovery.—*Caffini v. Hermann, Me.*, 91 Atl. 1009.

8. **Assignments for Benefit of Creditors**—Special Deposit.—There is an equitable right to follow a special deposit or trust fund into the hands of an assignee for creditors as a claim superior to that of a general creditor under the assignment, though the deed of assignment fails to recognize such preference right.—*Lowther v. Lowther-Kaufman Oil & Coal Co., W. Va.*, 83 S. E. 49.

9. **Banks and Banking**—Collecting Agent.—A bank acquiring in due course a draft for the price of goods, with bill of lading attached, is the owner thereof, and the proceeds in the possession of another bank collecting the draft cannot be attached as the property of the seller, but, where the bank merely took the draft and

bill of lading as a collecting agent, it acquires no property right in the proceeds.—*Elm City Lumber Co. v. Childerhose & Pratt, N. C.*, 83 S. E. 22.

10.—Debtor and Creditor.—Where parties intend that title to paper deposited in a bank shall pass to the bank, that the bank is understood to have a right to charge the amount back if it shall prove uncollectable will not change the relation of debtor and creditor.—*First National Bank of Fayetteville, Tenn., v. McMillan Bros., Ga.*, 83 S. E. 149.

11.—Duty of Inquiry.—A draft issued by a village bank was payable to the order of the defendant bank put defendant on inquiry as to the ownership of the proceeds before paying same to the person presenting the draft.—*Bjorago v. First Nat. Bank of Emmons, Minn.*, 149 N. W. 3.

12.—Insolvency.—Where a bank incurs a debt on the basis of stock subscribed, the subscriber cannot, after insolvency of the bank, obtain relief from fraudulent representations in the securing of his subscription.—*Wilkes v. Knight, Ga.*, 83 S. E. 89.

13.—Stockholder Liability.—Where either the transferor or the transferee of stock in a state bank has been compelled to pay any money on account of the statutory liability of stockholders, which the other in good faith should have paid, he may look to such other for payment.—*Robinson-Pettit Co. v. Sapp, Ky.*, 169 S. W. 869.

14. **Bills and Notes**—Notice.—That a purchaser before maturity of a note detached from a contract knew that the contract empowered the payee to detach the note did not bring home to him knowledge of any fraud practiced on the maker at the time of the making of the contract and note.—*Pratt v. Rounds, Ky.*, 169 S. W. 848.

15. **Boundaries**—Evidence.—The relative weight to be given evidence of disputed boundaries ranks as follows: (1) Natural boundaries; (2) artificial marks; (3) course and distance. But this rule is not absolute, and may be changed by the special circumstances in the case.—*Southern Realty & Inv. Co. v. Kennan, S. C.*, 83 S. E. 39.

16.—Natural Monuments.—Where natural monuments referred to in the description can be found, they fix the boundary, though they correspond neither with the courses and distances nor with the quantity of land in the same description.—*Miles Land Co. v. Hudson Coal Co., Pa.*, 91 Atl. 1061.

17. **Brokers**—Commission.—Where an applicant for a loan wrote the agent that he had procured the loan elsewhere, to which the agent replied that that was satisfactory provided the applicant made another loan through him in the future, but later the agent's company refused to make the later loan, the agent could not recover commission for the former loan.—*Stogsdill v. Holmes, Ark.*, 169 S. W. 961.

18. **Cancellation of Instruments**—Pleading.—While defendant, in an action to cancel a deed on the ground of fraud, cannot plead plaintiff's fraud to defeat a recovery, yet, where he has paid out money by reason of plaintiff's fraud, he may plead that fact and have it adjudicated in case a rescission is decreed.—*Paschal v. Hudson, Tex.*, 169 S. W. 911.

19. **Carriers of Goods**—Estoppel.—An initial carrier is estopped as against an innocent purchaser of goods, to deny that the shipment did not include all the goods called for by the bill of lading.—*Palmetto Fertilizer Co. v. Columbia, N. & L. Ry. Co., S. C.*, 83 S. E. 36.

20.—Rates.—Where a carrier has filed interstate rates graduated according to value of the articles shipped, the shipper's valuation automatically fixes the rate, though the difference in rates is not called to the shipper's attention.—*Robinson v. Louisville & N. R. Co., Ky.*, 169 S. W. 831.

21.—Redelivery.—A consignor of goods, which had been loaded and for which a bill of lading had been issued to his agent, as consignee, before any new interest had intervened, and subject to the carrier's claim for full freight had the right to cancel the contract of shipment

and to require a redelivery.—*Texas Midland R. R. v. Hargrove, Tex.*, 169 S. W. 925.

22.—**Stipulation.**—A stipulation which requires written notice to the delivering carrier of any claim for damages before the removal of the stock as a condition precedent to a recovery of damages is reasonable.—*Duvall & Bell v. Norfolk-Southern Ry. Co., N. C.*, 83 S. E. 21.

23.—**Carriers of Passengers—Contract.**—A railroad station agent had no authority to contract for the transportation of a party of men to his station without receiving the full consideration for the transportation or arranging for its payment upon call for the tickets.—*Cuozzo v. Maine Cent. R. Co., Me.*, 91 Atl. 1006.

24.—**Transfers.**—A municipality which has the power to prescribe in the franchise of a street railway company the maximum fare, also has the power to require the company to issue transfers.—*City of Barre v. Barre & M. Traction & Power Co., Vt.*, 92 Atl. 237.

25.—**Charities—Accumulated Income.**—Under will creating trust, income to be paid to hospital whenever fund amounted to \$75,000, and authorizing payment of \$25,000 of the principal to be used in building a hospital, held that, where hospital association, after the fund reached such sum, built a hospital, the trustees might pay such sum of \$25,000 and the accumulated income.—*Moore v. McKenzie, Me.*, 92 Atl. 296.

26.—**Commerce—Burden on.**—That the train by which decedent was killed carried interstate passengers did not render the blow-post law (Civ Code 1910, §§ 2675-2677) void, as an unreasonable burden on interstate commerce.—*Georgia R. & Banking Co. v. Auchinachie, Ga.*, 83 S. E. 127.

27.—**Mental Anguish.**—*Kirby's Dig.* § 7947, authorizing recovery for mental anguish for delay in delivering a death message, held inapplicable to a message sent from Arkansas to Oklahoma, where such was not the law, since to so apply it would be an invalid restriction on interstate commerce.—*Western Union Telegraph Co. v. Compton, Ark.*, 169 S. W. 946.

28.—**Constitutional Law—Foreign Corporation.**—Const. art. 12, § 11, held to apply only to corporations within the state in pursuance of its laws; and hence a foreign corporation, whose license had been revoked for the removal of a cause, under Act, May 13, 1907, could not set up the unconstitutionality of the act.—*State v. Hodges, Ark.*, 169 S. W. 942.

29.—**Corporations—Capitalizing Assets.**—Capitalization of the assets of a corporation on the basis of earnings of the preceding year, when there was nothing to show that such earnings would not probably be increased, was not an overcapitalization, so as to justify an assessment against stockholders on the corporation's subsequent insolvency.—*Railway Review v. Groff Drill & Machine Tool Co., N. J.*, 91 Atl. 1021.

30.—**Unissued Shares.**—A corporation may pledge its unissued shares as collateral for a loan made to it, and when stock is so pledged the creditor may prove his debt against the corporation's receiver and return the stock.—*In re International Radiator Co., Del.*, 92 Atl. 255.

31.—**Courts—Res Judicata.**—A decision in an action brought under the state law that there could be no recovery for the death of a railroad employe because of his contributory negligence does not control in a subsequent action in the state court under the federal Employer's Liability Act.—*Cincinnati, N. O. & T. P. Ry. Co. v. Swann's Adm'x, Ky.*, 169 S. W. 886.

32.—**Criminal Evidence—Impeachment.**—Until a defendant offers evidence of his general reputation, to create an inference that he did not commit the crime charged, the state may not show his reputation for immorality, except to impeach him as a witness.—*Combs v. Commonwealth, Ky.*, 169 S. W. 879.

33.—**Criminal Law—Custody of Jury.**—Where it was reputed that the deputy sheriff, in whose charge the jury were placed with accused's consent, was related to deceased, but that fact was denied by the deputy, and it did not appear that he in any way improperly influenced the jury, accused cannot complain of

the relationship, if any, between deceased and the deputy.—*Combs v. Commonwealth, Ky.*, 169 S. W. 879.

34.—**Damages—Special Damages.**—Such damages as may be presumed to naturally and necessarily result from an injury need not be stated with any very great particularity, but damages which are not thus implied must be specially pleaded in order to apprise defendant of the facts intended to be proved.—*Main Jellico Mountain Coal Co. v. Young, Ky.*, 169 S. W. 841.

35.—**Special Damages.**—The allegations of the items of damage in an action for breach of an implied warranty of goods sold should be specific as to stoppage of business and resulting loss.—*John A. Roebling's Sons Co. v. Southern Power Co., Ga.*, 83 S. E. 138.

36.—**Dead Bodies—Property Right.**—At common law there can be no property in a dead human body, but the right to its possession and disposition is a quasi property right which the courts will recognize and protect, and in the absence of any testamentary disposition the right of preservation and burial belongs to the surviving husband or wife, or next of kin.—*Floyd v. Atlantic Coast Line Ry. Co., N. C.*, 83 S. E. 12.

37.—**Death—Instructions.**—An instruction, in a mother's action for the death of her son, directing the jury to capitalize the amount which she had a reasonable expectation of receiving from him during her life, was correct; the word "capitalize" meaning "to convert the periodical payments to a sum in hand."—*Brown v. Erie R. Co., N. J.*, 91 Atl. 1023.

38.—**Survival of Action.**—Under the federal Employers' Liability Act, where an employe lives an appreciable time after his injury, his cause of action survives.—*Capital Trust Co. v. Great Northern Ry. Co., Minn.*, 149 N. W. 14.

39.—**Deeds—Capacity of Grantor.**—Neither old age, sickness, nor distress in mind or body incapacitates a grantor, who has possession of his mental faculties and understands the transaction in which he is engaged, from disposing of his property.—*Crow v. Childress, Tex.*, 169 S. W. 927.

40.—**Description.**—On an issue whether a deed contained a particular 50-acre tract patented by the grantor, May 29, 1856, the particular description being unintelligible, the court would give controlling effect to a general statement that it was intended to convey such tract.—*Bain v. Tye, Ky.*, 169 S. W. 843.

41.—**Pleading.**—A petition which alleges that a stipulation was omitted from a deed executed by plaintiff, but which does not allege that the grantee agreed that the stipulation might be inserted, or that it was omitted by mutual mistake, is fatally defective as against a demurrer.—*Crawford v. Dupriest, Ky.*, 169 S. W. 840.

42.—**Subsequent Deed.**—Where two parties purchased adjoining land from the same source, the description contained in the prior deed controls, since no subsequent deed from that source could deprive the prior grantee of any portion of the lands conveyed to him.—*Southern Realty & Inv. Co. v. Keenan, S. C.*, 83 S. E. 39.

43.—**Dower—Consideration.**—Where a husband induced his wife to enter into an agreement to accept in lieu of her dower and distributive rights a small share in his estate, the amount of which the husband had understated, the jointure agreement is invalid, there being no consideration to support it, as the jointure was less than the wife's statutory share.—*Redwine's Ex'r v. Redwine, Ky.*, 169 S. W. 864.

44.—**Easements—Visible Objects.**—Where plaintiff purchased a parcel of land from defendant's grantor, and such parcel was supplied with water by a pipe running over the land retained by defendant's grantor, defendant took the property subject to plaintiff's easement of necessity, where the pipe was visible.—*Watson v. French, Me.*, 92 Atl. 290.

45.—**Way of Necessity.**—Where, at the time of the sale of a portion of land to defendant, there was an existing way from the buildings located thereon to a highway, which way was not one of necessity, nor an existing easement,

the right to use it did not pass an appurtenance.—*Duvall v. Ridout*, Md., 92 Atl. 209.

46. **Eminent Domain**—Bill of Rights.—Drainage Act, § 14, requiring the assessment of all damages unless waived, does not violate Bill of Rights, § 13, or Const. § 242, by taking without compensation property owned by those who cannot claim their damages because of legal disability.—*Shaw v. Board of Drainage Com'rs of Daviess County, Ky.*, 169 S. W. 859.

47. **Usufructuary Interest**—The usufructuary interest of the lessee of the railroad belonging to the state is not subject to condemnation as an independent interest in land.—*Western Union Telegraph Co. v. Western & A. R. Co., Ga.*, 83 S. E. 135.

48. **Estoppel**—Conversion.—Failure to make a claim in court for property which is being or about to be sold does not estop the owner from subsequently suing for its conversion.—*Parks v. Halley, Ga.*, 83 S. E. 100.

49. **Executors and Administrators**—Where the heirs frequently insisted that the administrator should settle the estate, and filed a petition to compel him to do so, they were not estopped to deny that they consented to the carrying on the business of the decedent, without settlement, and the use of the property as a common fund, because they used some of the proceeds of the estate.—*Skelly v. Skelly, Vt.*, 92 Atl. 234.

50. **Evidence**—Admissibility.—Evidence that accused, a short time before he shot deceased, threatened the witness, and stated that he would as soon shoot his own father as any one else, is admissible to show accused's frame of mind at the time of the killing.—*Combs v. Commonwealth, Ky.*, 169 S. W. 879.

51. **Incompetency**—In an action against deputy sheriff for assaulting person suspected of having liquor in his suit case, evidence as to other persons having transported liquor in suit cases, and as to the seizure of liquor so transported, held properly excluded.—*Caffini v. Hermann, Me.*, 91 Atl. 1009.

52. **Materiality**—In the prosecution of one charged as accomplice to the murder of the husband of the woman with whom defendant had had illicit intercourse, evidence that the deceased's wife knew that her husband had visited houses of ill fame was not material, and was properly excluded.—*Millner v. State, Tex.*, 169 S. W. 899.

53. **Exchange of Property**—Rescission.—A person, injured through misrepresentations as to the incumbrances on property for which he exchanges his property, may rescind.—*Hamilton v. Duvall, Ga.*, 83 S. E. 103.

54. **Executors and Administrators**—Secured claim.—Presentation of a claim against insolvent estate, without notice to the commissioners of the security held by the creditor and the allowance of the claim, held not to deprive the creditor of her right to the security and to a dividend from the estate upon the excess of the debt.—*Wagner v. Mutual Life Ins. Co. of New York, Conn.*, 91 Atl. 1012.

55. **Sham Sale**—While the right to have decreed void an executor's sale to himself, generally rests in the heirs, yet if the executor and legatees agree to a sham sale and purchase by the executor to defeat creditors of an heir such creditors may attack the sale.—*Webb v. Deadwyler, Ga.*, 83 S. E. 99.

56. **Fraud—Intent**—It is not necessary to show that a party making fraudulent representations intended to perpetrate a fraud, but if they are such as to create a false impression, causing the other party to act believing them to be true, such representations are fraudulent.—*Paschal v. Hudson, Tex.*, 169 S. W. 911.

57. **Reliance on Representations**—Where defendant asserts positively and as of his own knowledge that which he does not know, and it is in fact untrue, he will be liable to a person relying on his statement to his damage.—*Rogers v. Rosenfeld, Wis.*, 149 N. W. 33.

58. **Variance**—There is a fatal variance between an allegation that defendant falsely represented that his agent had sold 100 copies of plaintiff's song and proof that defendant stated that he had received a letter to that ef-

fect, without proof that defendant had received no such letter.—*Carter v. Orne, Me.*, 92 Atl. 289.

59. **Frauds, Statute of—Original Promise**—Where seller of potatoes to K, who had contracted to furnish them to defendant, was told that if K did not pay for them defendant would, and the potatoes were then shipped to defendant, his promise was an original promise, with in Rev. St., c. 113, § 1, par. 2.—*Colbath v. Everett D. Clark Seed Co., Me.*, 91 Atl. 1007.

60. **Parol Agreement**—A promoter's parol agreement to repurchase stock from a subscriber, held unenforceable under Civ. Code 1910, § 3222.—*Weatherly v. Cotter, Ga.*, 83 S. E. 104.

61. **Fraudulent Conveyances**—Evidence.—Where a grantor, having been sued, conveyed all his property to his father and mother and left the state, and judgment was recovered against him, a finding that the conveyance was fraudulent and voidable, as provided by Ky. St. § 1966, was proper.—*Hale v. Proffitt, Ky.*, 169 S. W. 851.

62. **Guardian and Ward**—Foreign Guardian.—In a foreign guardian's proceeding for the transfer of property pursuant to Code 1913, (secs. 3981, 3983), the amount for which the resident guardian is liable need not be ascertained in advance of the entry of the order, nor need the court await the determination of other litigation involving the estate.—*Fidelity Trust Co. v. Davis Trust Co., W. Va.*, 83 S. E. 59.

63. **Marriage of Ward**—Where another appointed a testamentary guardian for her infant son, she cannot, by a provision in her will, require the guardian, upon marriage of the son during infancy, to deliver him his estate.—*Hudson's Guardian v. Hudson, Ky.*, 169 S. W. 891.

64. **Homicide—Motive**—In the prosecution of one charged as accomplice to the murder of the husband of a woman with whom defendant admitted he had had illicit intercourse only a short time before the homicide, testimony that the intimacy had extended over several months, and that the defendant and the woman were desirous of marrying, was admissible to show motive.—*Millner v. State, Tex.*, 169 S. W. 899.

65. **Husband and Wife—Equity**—Loans by wife to husband and assignment of insurance policy by husband to wife to secure loans, when made in good faith, held enforceable in equity.—*Wagner v. Mutual Life Ins. Co. of New York, Conn.*, 91 Atl. 1012.

66. **Estoppel**—Where a wife loaned plaintiff her separate funds, such debt was not affected by the fraud of her husband in inducing plaintiff to execute certain notes to him for the same amount on a promise to return to plaintiff the note he had executed to the wife.—*Strader v. Strader, Ky.*, 169 S. W. 857.

67. **Infants—Rescission**—A married woman who, while under the age of 21 years, sold and conveyed real estate, cannot rescind the sale on reaching her majority under Rev. St., c. 63, § 1, which is a condonation of earlier statutes relieving her from disability of infancy.—*Fields v. Mitchell, Me.*, 92 Atl. 293.

68. **Injunction—Cross-Bill**—In a suit to restrain continued trespass by a railroad company on land claimed by complainant, right of defendant to affirmative relief on its denial of complainant's alleged title, together with right to compel complainant to remove certain obstruction on the land, held a proper subject for a cross-bill.—*Averill v. Vermont Valley R. R., Vt.*, 92 Atl. 220.

69. **Insurance—False Representation**—A representation by an applicant for life insurance that he had never been examined for insurance and rejected is material, and, if false, avoids the policy.—*Hardy v. Phoenix Mutual Life Ins. Co., N. C.*, 83 S. E. 5.

70. **Insurable Interest**—Where land was conveyed to plaintiff's father, because plaintiff was a minor and could not execute a valid mortgage thereon, but the father held in trust for plaintiff, the latter had an insurable interest.—*Cummings v. Dirigo Mut. Fire Ins. Co., Me.*, 92 Atl. 298.

71. **Premiums**—Where the application was dated June 13th, and a policy issued June 23d, which gave a grace of one month in payment of annual premiums, except the first, and insured died several years later on July 23d

without having paid the premium for that year, held that his policy had not lapsed.—*Clek v. New York Life Ins. Co., Neb.*, 149 N. W. 49.

72. **Intoxicating Liquors**—Ordinance.—A municipal ordinance, making it unlawful to carry intoxicating liquor for unlawful sale, held not in conflict with Pen. Code 1910, § 426, making it unlawful to keep or furnish at places of business or public places any intoxicating liquors.—*Ramsey v. City of Atlanta, Ga.*, 83 S. E. 148.

73.—**Unlawful Search**—Circumstances such as would cause an ordinarily prudent officer to believe that plaintiff had intoxicating liquor in his suit case for unlawful purposes, held not to justify officer in searching the suit case and using force necessary for that purpose.—*Caffini v. Hermann, Me.*, 91 Atl. 1009.

74. **Judgment**—Merger.—Where a corporation which has purchased the property of another corporation and assumed its debts gives renewal notes for the debts, an unsatisfied judgment against the purchasing corporation on the renewal notes will not extinguish the original debts by merger.—*Lowther v. Lowther-Kaufman Oil & Coal Co., W. Va.*, 83 S. E. 49.

75.—**Motion to Open**—Where on an application to open a confessed judgment on a note, there was sufficient testimony to sustain a finding that the note was signed by one defendant as a surety for her husband, the granting of the application was not an abuse of discretion.—*Stewart v. Stewart, Pa.*, 92 Atl. 319.

76.—**Non-Resident**—The Wisconsin statute authorizing personal judgments against a non-resident upon constructive service, where the non-resident has property within the state subject to the state's jurisdiction, is constitutional.—*Closson v. Chase, Wis.*, 149 N. W. 26.

77.—**Vacating Default**—Where defendant's attorney failed to file the answer in time, because he did not know of a change in the terms of court under an unindexed session act, the default will be vacated.—*Callahan Const. Co. v. Thomas, Ky.*, 169 S. W. 828.

78. **Justices of the Peace**—Certiorari.—The action of a justice of the peace in taking jurisdiction of an action where the amount involved exceeded his jurisdiction may be corrected by certiorari, though no judgment has been rendered.—*Stroud v. Conine, Ark.*, 169 S. W. 959.

79. **Landlord and Tenant**—Licensee.—Where plaintiff went to a barber shop in a rented building to give the barber a drink of whisky, and on returning fell because of a defective rail around a landing at the top of the outside stairs, he was a mere licensee, as to whom the landlord owed no duty to exercise reasonable care.—*Austin v. Baker, Me.*, 91 Atl. 1005.

80.—**Pleading**—A petition for injuries caused by striking plaintiff's bare foot against a nail in timber alleged to have been left by defendant's employees in a passway which plaintiff was authorized to travel on defendant's premises, held insufficient.—*Amburgy v. Pond Creek Coal Co., Ky.*, 169 S. W. 855.

81. **Libel and Slander**—Privilege.—A letter written by one attorney to another, casting serious aspersions on the client of the addressee not confined to matters in litigation in which the attorneys were then engaged, held not privileged.—*Savage v. Stover, N. J.*, 92 Atl. 284.

82. **Licenses**—Restriction.—An ordinance prohibiting the operation without a license of a billiard room or tenpin alley held not an unreasonable restriction on business.—*Trammell v. Yancey, Ga.*, 83 S. E. 114.

83. **Life Estates**—Subrogation.—Where appellee, believing that the testator's wife could convey the fee of land devised to her for life, cared for her in consideration of a conveyance of the fee, he is, as against the remaindermen, subrogated to any rights of the wife to have the land sold for her support.—*Hickman v. Moore, Ky.*, 169 S. W. 827.

84. **Limitation of Actions**—Laches.—Plaintiffs, in an action to recover for land conveyed by their grantor to defendants by mistake, if subrogated to the rights of their grantor, held chargeable with his discovery of the mistake and barred by his delay.—*Eversole & Co. v. Burt & Brabb Lumber Co., Ky.*, 169 S. W. 846.

85.—**Tolling**—Where a grantor fraudulently misrepresented the number of acres conveyed,

a purchaser from his grantee cannot toll the running of limitations against his action for deficiency by claiming that he relied upon the representations of the original grantor that the property had been surveyed and contained the number of acres represented.—*Powell v. March, Tex.*, 169 S. W. 936.

86. **Mandamus**—Motion to Quash.—In mandamus the alternative writ takes the place of the declaration, and the facts therein well pleaded are admitted by a motion to quash the alternative writ.—*State v. Lewis, Del.*, 91 Atl. 993.

87. **Master and Servant**—Emergency.—That a railroad employee needed assistance to load a trunk onto a passenger train was not such an emergency as authorized him to employ a third person to assist, and such person was but a volunteer.—*Missouri, K. & T. Ry. Co. of Texas v. Moore, Tex.*, 169 S. W. 916.

88.—**Instructions**—Where decedent fell from a hand car from a defect in the car and was killed, an instruction that there could be no recovery unless the car's unsafe condition could not have been discovered by him by ordinary care was erroneous.—*Hale's Adm'r v. Illinois Cent. R. Co., Ky.*, 169 S. W. 877.

89.—**Obvious Danger**—It cannot be said as a matter of law that a defect which allowed a cant hook at the end of the pole to oscillate slightly, so that it pulled out, is so obvious that a servant using such a hook was charged with knowledge of the defect.—*St. Louis, I. M. & S. Ry. Co. v. Brown, Ark.*, 169 S. W. 940.

90.—**Relation**—The relation of master and servant is not terminated by mere cessation of the duties assigned, but continues such reasonable time thereafter as will afford the servant opportunity to reach a place of safety from perils of the employment.—*Jones v. Virginian Ry. Co., W. Va.*, 83 S. E. 54.

91.—**Substantial Performance**—Person employed as manager of department store held to have substantially complied with his contract if he was a fairly efficient manager, gave his whole time and ability to the business in good faith, performed his duties to the best of his ability, and did not misconduct himself or otherwise violate the contract.—*Carroll v. Cohen, Del.*, 91 Atl. 1001.

92.—**Warning**—A railroad foreman engaged in work alongside the track, part of whose duty it was to watch for approaching trains, is not entitled to rely on the observance by train employees of rules requiring them to slow down and sound warnings on approaching such places.—*Cincinnati, N. O. & T. P. Ry. Co. v. Swann's Adm'r, Ky.*, 169 S. W. 886.

93.—**Workmen's Compensation Act**—The jurisdiction conferred on the Supreme Court of Appeals by Acts 1913, c. 10, § 43 (Code 1913, c. 15p [sec. 699]), to review acts of the Public Service Commission respecting the administration of the workmen's compensation fund, is original, and not appellate.—*De Constantin v. Public Service Commission, W. Va.*, 83 S. E. 88.

84. **Mechanics' Liens**—Evidence.—That an owner after receiving a stop notice from a subcontractor paid him \$900 on account of the amount claimed in the notice, such fact, with others, was sufficient to show that the owner was satisfied with the sub-contractor's work.—*Hoffmeir v. Trost, N. J.*, 92 Atl. 277.

95. **Mines and Minerals**—Royalties.—Where lessee paid the royalties into court, and the lessor of the adjacent lands asked the court to establish the rights of the owners of the lands, the court must determine such question and direct the payment of royalties accordingly.—*Scott v. Daniels, Ky.*, 169 S. W. 830.

96. **Municipal Corporations**—Governmental Duty.—The city of Louisville exercises a governmental function for the protection of the city's health, in the maintenance of sewers and is not liable for the death of an employee who while trying to remove a wooden form from the water at the mouth of a sewer, fell into the water and was drowned by reason of the wet and slippery condition of the pier, due to their negligence.—*Johnson's Adm'r v. Commissioners of Sewerage of Louisville, Ky.*, 169 S. W. 827.

97.—**Ordinance**—Where an ordinance specifies no time within which a prosecution must be instituted, no lapse of time will bar a prosecution of an act committed after enactment of the ordinance.—*Ramsey v. City of Atlanta, Ga.*, 83 S. E. 148.

98. **Navigable Waters**—Survey.—A survey returned as bounded by a navigable river vests in the owner the right to the soil to the ordinary low water mark, subject to certain rights of the public in the stream between ordinary high and ordinary low water mark.—*Miles Land Co. v. Hudson Coal Co.*, Pa., 91 Atl. 1061.

99. **Negligence**—Proximate Cause.—The doctrine of comparative negligence and apportionment of damages does not apply, where the contributive negligence of the injured person was the sole cause of injury, or where by ordinary care he could have avoided injury.—*Georgia R. & Banking Co. v. Auchinachie*, Ga., 83 S. E. 127.

100. **Partition**—Transfer to Other Docket.—Where issue in partition is joined as to the right of one of the claimants to share as a tenant, the clerk must transfer the case to the civil docket for jury trial, the statute being mandatory, and hence the clerk cannot dismiss the proceedings at the request of plaintiffs.—*Haddock v. Stocks*, N. C., 83 S. E. 9.

101. **Partnership**—Dissolution.—In view of Civ. Code, §3231, where a note signed in a firm name by a partner and the manager is accepted in settlement of an account against the firm, the partners are bound, though the partnership has been dissolved without notice to the creditor.—*Parker v. Southern Ruralist Co.*, Ga., 83 S. E. 158.

102.—**Holding Out**.—Where there is a holding out of a partnership relation by persons inviting to their premises a person injured from their negligence, liability results, without regard to the actual existence of the partnership relation.—*Jewison v. Dieudonne*, Minn., 149 N. W. 20.

103. **Paupers**—Question of Fact.—Under Rev. St. c. 27, § 45, notice by plaintiff as to the condition of his father and mother, and his inability to support them, held to contain all the elements of information required, and whether they were so clearly and expressly stated as to enable the officers to understand them was a question for the jury.—*Allen v. Inhabitants of Lubec*, Me., 91 Atl. 1011.

104. **Perpetuities**—Defined.—Where the event on which an estate is to arise is an option to purchase, which is so uncertain that it may expire at some time in the future or may not expire at all, the interest created at the option is not vested, but is contingent, and is within the rule against perpetuities.—*Barton v. Thaw*, Pa., 92 Atl. 312.

105. **Prostitution**—Variance.—An indictment under the Pandering Act for enticing a female under age to engage in a life of prostitution at the home of defendant, "situated on Lake street in the city of Paragould," held not sustained by proof that the house was not upon Lake street, but on a street in the vicinity.—*Lee v. State*, Ark., 169 S. W. 963.

106. **Railroads**—Evidence.—In an action for the death of a traveler at a crossing, evidence held insufficient to show that the servants in charge of the train were guilty of any negligence after they saw that deceased was about to go on the track.—*Seviour v. Rutland R. Co.*, Vt., 91 Atl. 1039.

107.—**Humanitarian Doctrine**.—Where a railroad company discovers that a trespasser is in danger of being struck by an approaching train and that he is unaware of his peril, it is then bound to exercise ordinary and reasonable care to prevent injury to him.—*Georgia R. & Banking Co. v. Auchinachie*, Ga., 83 S. E. 127.

108. **Reference**—Recommittal.—Where the trial judge deems that there is not sufficient finding of facts to support the referee's conclusion, he should either find the fact from the evidence, or recommit the case to the referee, with directions to make a more specific finding of facts.—*French v. Richardson*, N. C., 83 S. E. 31.

109. **Sales**—Implied Warranty.—In contracts for the sale of personal property, as between dealers, there is no implied warranty as to quality, but there is an implied warranty that the goods shall be salable; it being the seller's duty to furnish property in compliance with the contract of sale.—*Ashford v. H. C. Schrader Co.*, N. C., 83 S. E. 29.

110.—**Implied Warranty**.—Where a contract of sale of copper wire for electrical purposes

specified its diameter and its conductivity, there was an implied warranty that it was properly constructed wire of the size and kind specified and reasonably suited for use.—*John A. Roebbing's Sons Co. v. Southern Power Co.*, Ga., 83 S. E. 138.

111. **Street Railroads**—Franchise.—Where a city granted a street railway company a franchise, and after it was assigned to defendant amended it by a relocation of part of the line, which relocation was accepted by defendant, all other provisions and conditions in the franchise remained in force.—*City of Montpelier v. Barre & M. Traction & Power Co.*, Vt., 92 Atl. 241.

112. **Taxation**—Forfeiture.—The presumption against forfeiture of title for nonpayment for taxation and nonpayment of taxes relieves the plaintiff, in a proceeding to vindicate his title, from proving in the first instance the taxation thereof and the payment of taxes thereon.—*Wildell Lumber Co. v. Turk*, W. Va., 83 S. E. 83.

113. **Telegraphs and Telephones**—Benefit of Third Person.—The addressee of a telegram negligently delayed in delivery is entitled to sue therefor as a party to a contract made for his benefit.—*Western Union Telegraph Co. v. Compton*, Ark., 169 S. W. 946.

114. **Time**—Computation.—Pen. Code 1910, § 1, par. 8, providing that when a number of days is prescribed, and the last day falls on the Sabbath, another day should be allowed, is not applicable, so as to exclude Sunday, where the computation is of months or years.—*Brown v. Emerson Brick Co.*, Ga., 83 S. E. 160.

115. **Torts**—Actionable Wrong.—Where one is injured by the wrongful act of another, and a third person suffers an indirect loss from some contract obligation to the injured party, the loss is not actionable; but if the wrongful act is maliciously and fraudulently intended to injure such third person, and does injure him, it is actionable.—*Nieberg v. Cohen*, Vt., 92 Atl. 214.

116. **Trespass**—Boundary Line.—Where the boundary line between tracts, title to which was derived from a common grantor, is in dispute, the claimant in possession can hold against all the world, except the true owner, and the first claimant can recover in trespass only in case the land in dispute is within the description in the conveyance to him.—*Southern Realty & Inv. Co. v. Keenan*, S. C., 83 S. E. 39.

117. **Trover and Conversion**—Landlord and Tenant.—A landlord, when sued for the conversion of chattels of the tenant, may show that he removed articles from the leased building for safekeeping and had tendered the same to the tenant.—*Copeland v. Porter*, Tex., 169 S. W. 915.

118. **Trusts**—Overpayment.—Where executrix overpaid herself as legatee and as trustee under a trust for her own benefit and gave her note to the trustees under another trust in the residue of the estate, held, that they should hold this note as principal and not turn it over to their cestui que trust.—*Moore v. McKenzie*, Me., 92 Atl. 296.

119.—**Parol Trust**.—Delivery of money by wife to husband with direction to deposit it for care and education of son, and deposit in husband's name as trustee, held to create a valid, enforceable, parol trust in favor of the son.—*Graham's Adm'r v. English*, Ky., 169 S. W. 826.

120.—**Presumption**.—The rule that a trustee buying trust property at a sale, whether public or private, brought about or in any way directed by him, will be presumed to buy for the benefit of the trust does not apply where the trustee has no direct control over or is not instrumental in bringing about the sale.—*Calvert v. Woods*, Pa., 92 Atl. 301.

121.—**Spendthrift Trust**.—Where an insurance company had sold to a spendthrift, since deceased, shares of its stock at par value, and there was no evidence as to value, except that deceased had sold it for different amounts, the insurance company's claim against the estate for such stock was properly allowed at the highest price received by deceased for any of it.—*Ford v. Southern Nat. Life Ins. Co.*, Ky., 169 S. W. 874.

122. **Vendor and Purchaser**—Record of Deed.—A deed of land lying partly in two or more counties must, in order to give full protection against creditors and subsequent purchasers for value without notice, be recorded in each county.—*Wildell Lumber Co. v. Turk*, W. Va., 83 S. E. 83.